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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 454

JAY B. PHELPS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY,

Appellees.

STATEMENT PURSUANT TO RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

This case is one in which the validity of a statute of the State of New Jersey, to wit, Chapter 12 of the New Jersey Laws of 1933, approved February 4, 1933, is drawn in question upon the ground that the said Statute is repugnant to Article 1, Section 10 of the Constitution of the United States, and also repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States. The final decision of the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey, the highest court of said State in which a decision in the above entitled cause could be had, is in favor of the validity of said Statute. Therefore, in accordance with Rule 46,

Paragraph 2, of the Rules of the Supreme Court of the United States (28 U. S. C. A.), the petitioner respectfully shows that this case is one in which under the legislation in force when the act of January 31, 1928 (45 Stat. 54), as amended by the act of April 26, 1928 (45 Stat. 466), was passed, to wit, under Section 237(a) of the Judicial Code (28 U. S. C. A., Section 344), a review could be had in the Supreme Court of the United States on writ of error.

As stated above, the Statute of New Jersey, the validity of which is involved in this case, is Chapter 12 of the New Jersey Laws of 1933 (P. L. 1933, page 24), which Statute reads as follows:

> "AN ACT respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State.
>
> WHEREAS, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compensation to be paid to officers and employees of and persons holding positions in any such school district; therefore,
>
> BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:
>
> 1. The board of education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district, between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four, notwithstanding any such person be under tenure or not; *Provided, However,* that no salary or compensation of any officer or employee of or person holding a position in any school district shall be increased between the first day of July, one thousand nine hundred and thirty-three, and the first;

day of July, one thousand nine hundred and thirty-four; *and Provided, Further,* that if any such person be a member of the Teachers' Pension and Annuity Fund of the State of New Jersey, or any employees' pension fund, such person may continue to pay, or cause to be paid, into such pension fund the same amount as if such salary or compensation had not been changed, and upon the death or retirement of such member, he or his beneficiary shall be entitled to the same benefits as if his salary or compensation had not been changed; *and Provided, Further,* that in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service; *Provided, However,* that the existing minimum salary of teachers of seventy dollars per month shall not be changed.

2. Nothing in this act contained shall be construed to affect or impair the continuity of position or employment under any tenure of office statute.

3. This act shall take effect immediately.

Approved February 4, 1933."

Judgment in this case was entered by the New Jersey Court of Errors and Appeals on May 21, 1936, and the petition for appeal, which this statement accompanies, is being presented on August 20th, 1936.

The foregoing statute has by its terms the effect of modifying Chapter 243 of the New Jersey Laws of 1909 (P. L. 1909, p. 398). That Chapter provides in part:

"No principal at teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary or clerk of the board of education having charge of the school in which the service is being rendered, and after the

charge shall have been examined into and found true in fact by said board of education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing."

* * * * * * *

"Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; and provided further, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect."

The appellant in the present case is a teacher who was employed for more than three consecutive years in the school district of the Town of West New York prior to the passage of Chapter 12 of the Laws of 1933 (*supra*). In reliance upon Chapter 12 of the Laws of 1933 the Board of Education of the Town of West New York undertook, by resolution, to reduce the salaries of its employes, including the salary of the appellant. The appellant thereupon instituted proceedings to test the legality of such action, contending before all of the tribunals below, and contending here, that when he began his fourth year of teaching, Chapter 243 of the New Jersey Laws of 1909 (*supra*) entered into and became a part of his contract of employment and that the attempt of the New Jersey Legislature to modify that contract by Chapter 12 of the Laws of 1933 (*supra*) is unconstitutional.

The Federal questions here sought to be reviewed were raised and argued in all of the tribunals of the State of New Jersey passing upon this case. The case was presented in the first instance to the Commissioner of Education of the State of New Jersey pursuant to the New Jer-

sey School Law (4 Comp. Stat. p. 4727, Sec. 10). This was done by petition of appeal alleging, among other things, that Chapter 12 of the New Jersey Laws of 1933, (*supra*), was unconstitutional. In the brief submitted to the Commissioner, specific reference was made to and argument based on the contract clause of the United States Constitution (Article 1, Section 10) and Section 1 of the Fourteenth Amendment as well as the New Jersey Constitution. The Commissioner refused to pass upon the constitutional questions raised upon the ground that he had no jurisdiction to do so, saying in his decision,

> "The State Board of Education in the case of *Albertson* v. *Glassboro*, decided December 1, 1924, held: 'Neither * * * the Commissioner nor this Board is empowered to declare any act passed by the Legislature to be contrary to the Constitution * * *.'"

An appeal was then taken to the New Jersey State Board of Education pursuant to the School Law (4 Comp. Stat. p. 4727, Sec. 10). This was done merely by notice of appeal, no grounds of appeal or assignment of errors being necessary. Before the State Board the same provisions of the United States Constitution were referred to and used as a basis of argument against the constitutionality of the statute in question, but the State Board in its decision adopted the same course followed by the Commissioner and refused to pass upon the question of constitutionality. The next step was the allowance of a writ of certiorari by the New Jersey Supreme Court.

The questions presented to that Court were defined by the reasons filed in support of the writ. These reasons are set forth at page 81 of the State Of Case presented to the New Jersey Court of Errors and Appeals. Reason #3 reads as follows:

> "3. The action of the Board of Education of the Town of West New York in reducing prosecutor's

salary for the period between July 1, 1933, and July 1, 1934, is illegal, in that Chapter 12 of the Laws of 1933 authorizing Boards of Education to reduce salaries of employees, whether under tenure or not, is unconstitutional in the following respects:

(a) It violates Article IV, sec. 7, par. 3 of the Constitution of New Jersey.

(b) It violates Article I, sec. 10 of the Constitution of the United States by impairing the Obligation of Contracts.

(c) It violates Amendment XIV, Sec. 1 of the Constitution of the United States by depriving persons of property without due process of law and by denying to them the equal protection of the laws."

The constitutional questions thus defined by reason #3 were actually argued before the New Jersey Supreme Court. That Court held the statute constitutional. A copy of the opinion is hereto appended. On appeal to the New Jersey Court of Errors and Appeals it was also argued that the statute was unconstitutional under the contract clause of the United States Constitution and under Section 1 of the Fourteenth Amendment. After considering this argument the Court of Errors and Appeals affirmed the Supreme Court and adopted its opinion. The grounds of appeal before the Court of Errors and Appeals made no mention of the constitutional question because of the well settled rule of New Jersey practice that on appeal from a judgment entered in the Supreme Court, where that Court sat as a reviewing court, the only correct assignment of error is that the Supreme Court erred in reversing or affirming. On such an assignment, reliance may be had upon the errors assigned in the Supreme Court. *Kleinert* v. *Hutchinson,* 98 N. J. L. 831, 121 Atl. 742. That practice was followed in the present case and, as stated, the constitutional questions were argued fully before the Court of

Errors and Appeal as well as before the Supreme Court and the other tribunals.

The opinion of the New Jersey Supreme Court which is appended hereto, applies not only to the present case but also to the companion case of *Askam et als.* v. *Board of Education of the Town of West New York et al.*, the two cases having been argued together. The only opinion filed by the Court of Errors and Appeals was reported in 116 N. J. L. 412, and reads as follows:

> "The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court."

On the basis of the foregoing brief history of the case, it is submitted that at every step the validity of the New Jersey Statute (Chapter 12, Laws of 1933) was called in question on the ground of its being repugnant to the Constitution of the United States and, the decision being in favor of the statute's validity, an appeal should be allowed under Section 237(a) of the Judicial Code (28 U. S. C. A. 344 (a)), as modified by the act of January 31, 1928 (28 U. S. C. A., Sec. 861a). The Federal question was presented for decision and its decision was necessary to the determination of the cause. Although the opinion of the New Jersey Supreme Court (which was adopted by the Court of Errors and Appeals) does not expressly state that the Federal question was actually decided, the clear inference is that it was in view of the reasons already referred to and the fact that the Federal question was argued; but even without such clear inference, the judgment as rendered could not have been rendered without deciding the Federal question presented. *Adams* v. *Russell*, 229 U. S. 353, 360. In further support of the contention that this case is within the appellate jurisdiction defined by Section 237(a) of the Judicial Code, 28 U. S. C. A. 344(a),

reference is made to *Gulf & S. I. R. Co.* v. *Hewes,* 183 U. S. 66, and *Griffith* v. *Connecticut,* 218 U. S. 563.

It is further submitted that the questions involved are substantial. When the United States Supreme Court is called upon to decide whether State legislation impairs the obligation of a contract, the questions are:

1. Was there a contract?

2. If so, what obligation arose from it?

3. Has that obligation been impaired by subsequent legislation?

Detroit United Railway v. *Michigan,* 242 U. S. 238, 249. The principal question here presented is: Did Chapter 243 of the New Jersey Laws of 1909 (*supra*) enter into and become a part of the contract of the appellant? If so, it seems to follow that there has been an impairment of the obligation by Chapter 12 of the New Jersey Laws of 1933.

The New Jersey Courts have recognized that the employment of school teachers is contractual, thus distinguishing such employment from the tenure of a public officer. *Gowdy* v. *State Board of Education,* 84 N. J. L. 231, affd. 85 N. J. L. 726, 86 Atl. 948, affd. 89 Atl. 1135. It has been held in other jurisdictions that such employment is contractual even though the teacher has become subject to a statute providing for permanent employment.

Martin v. *Fisher,* 108 Cal. App. 34; 291 Pac. 276;
School City of Elwood v. *State,* 203 Ind. 626, 180 N. E. 471;
Kostanzer v. *State,* 205 Ind. 536, 187 N. E. 337;
State v. *Blied,* 188 Wis. 442, 206 N. W. 213;
Steinson v. *Board of Education,* 165 N. Y. 431, 59 N. E. 300.

That a pension fund statute may become part of the contract of a teacher, thus placing modification beyond the power of the Legislature was held in *Ball* v. *Trustees,* 71

N. J. L. 64, 58 Atl. 111; followed in *Allen* v. *Board of Education,* 81 N. J. L. 135, 79 Atl. 101. In *State* v. *Board of School Directors,* 190 Wis. 445, 209 N. W. 683, the Supreme Court of Wisconsin stated, at p. 685, that the rights of a teacher who had become permanently employed under a statute generally similar to Chapter 243 of the New Jersey Laws of 1909 were contractual and could not be impaired by subsequent legislation or by action of the Board of Education.

As to the protection given contract rights by the Fourteenth Amendment, a contract was held to be property in *Long Island Water Supply Co.* v. *Brooklyn,* 116 U. S. 685.

Diligent search of the authorities during the course of this case has failed to disclose any decision of the United States Supreme Court deciding that a statute providing permanent employment for teachers after a certain period of probationary service does or does not create contractual rights which cannot be impaired by subsequent legislation. Nor has able counsel opposed to the appellant cited such decision. The questions here involved do not lack substance because they are already well settled, as in *Zucht* v. *King,* 260 U. S. 174 (cited in Rule 12, as amended March 2, 1936). It has been held that laws in force at the making of a contract enter into and become a part of it. *Northern Pacific* v. *Wall,* 214 U. S. 87. Whether the statute in question (Chapter 243, Laws of 1909) became a part of the contract is a substantial question. *Gulf & S. I. R. Co.* v. *Hewes,* 183 U. S. 66 (*supra*).

The recital of an emergency in the preamble to Chapter 12 of the New Jersey Laws of 1933 does not alter the situation, because the statute cannot be justified as emergency legislation by the rules laid down in *Home B. & L. Assn.* v. *Blaisdell,* 290 U. S. 398.

McCarter & English,
Attorneys for Appellant.
By Robert H. McCarter.

EXHIBIT "A".

Opinion of New Jersey Supreme Court—Reported in 115 N. J. L. 310, 180 Atl. 220.

JAY B. PHELPS, *Prosecutor,*

v.

STATE BOARD OF EDUCATION *et al., Defendants.*

LUCY ASKAM *et al., Prosecutor,*

v.

STATE BOARD OF EDUCATION *et al., Defendants.*

Argued May 10, 1935. Decided July 26, 1935.

1. Chapter 12 of the laws of 1933 (Pamph. L., p. 24) is not unconstitutional as impairing the obligation of contracts, or as depriving a citizen of the equal protection of the laws, as applied to the prosecutors in this case.

2. The proviso in chapter 12 of the laws of 1933 (Pamph. L., p. 24) forbidding discrimination among or between individuals in the same class of service is not violated by classifying teachers for purposes of salary reduction according to their former salaries.

3. The legislature by said act having declared the existence of an economic emergency requiring that certain powers be given to every board of education, it was not necessary for an individual board so to adjudge before exercising the powers.

On Certiorari.

Before Justices Parker, Case and Bodine.

For the prosecutors, Robert H. McCarter (Ward J. Herbert, on the brief).

For the defendants, Raymond J. Otis.

The opinion of the court was delivered by

PARKER, *J.*:

These two writs of certiorari bring up decisions of the state board of education, affirming on appeal decisions of the state commissioner of education which dismissed appeals of the several prosecutors challenging a resolution of the board of education of West New York in Hudson County, dated June 23d, 1933, which provided for certain reductions beginning July 1st, 1933, in salaries of the superintendent of schools, principals, supervisors and teachers, by percentages varying according to amount of salary; also a resolution readjusting the salaries of certain named clerks at certain stated figures. The commissioner of education dismissed the appeals before him on July 18th, 1934: the state board affirmed on February 9th, 1935.

The resolution first mentioned, relating to those having the status of teachers, is founded on chapter 12 of the laws of 1933 (Pamph. L., p. 24; N. J. Stat. Annual 1933, p. 410, sec. 185-225b), entitled "An act respecting the salaries or compensation of officers and employes, and persons holding positions in the several school districts of this state." This act contains the following preamble:

"Whereas, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this state be enabled to fix and determine, by resolution, the amount of salary or compensation to be paid to officers and employes of and persons holding positions in any such school district," and proceeds to enact that

"The board of education of every school district in this state shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employes of and persons holding positions in any such school district, between the first day of July, 1933, and the first day of July, 1934, notwithstanding any such person be under tenure or not." There are certain provisos not here material, viz., that there shall be no increase of pay during the year; that rights in the pension fund remain unaffected; that the existing minimum salary of teach-

ers of $70 per month remain unchanged; and a further proviso, relied on by prosecutors as part of their case, "that in fixing salaries or compensation there shall be no discrimination among or between individuals in the same class of service." Section 2 provides that nothing in the act "shall be construed to affect or impair the continuity of position or employment under any tenure of office statute."

The resolution of June 23d, 1933, relating to teachers reads as follows:

"Resolved, that between July 1st, 1933, and July 1st, 1934, the salaries of the superintendent of schools and of all principals, supervisors and teachers in the West New York school system be and they are hereby reduced as follows:

"All salaries from $1,200 to $1,999 per annum reduced ten per cent.;

"All salaries from $2,000 to $2,499 per annum reduced eleven per cent.;

"All salaries from $2,500 to $2,999 per annum reduced twelve per cent.;

"All salaries from $3,000 to $3,499 per annum reduced thirteen per cent.;

"All salaries from $3,500 to $3,999 per annum reduced fourteen per cent.;

"All salaries from $4,000 to $5,600 per annum reduced fifteen per cent.;

All figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1,200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1,600 per annum."

The other resolution of like date relates to "clerks" and is as follows:

"Resolved, that between July 1st, 1933, and July 1st, 1934, the salaries of clerks in the West New York school system be and they are hereby reduced to the amounts set opposite their respective names below:

"Pearl Rutan	$2,200	per annum.
Rose Millimet	1,600	" "
Caroline Johansen	1,600	" "
Madelyn Offerman	1,200	" "
Angela Wintrich	1,200	" "
Marie Martin	1,200	" "
Sylvia Wilson	1,200	" "
Cathleen Bach	1,200	" "
Virginia Otis	1,000	" "
Helen Roth	900	" "
Marion Holm	900	" "

We take up first the resolution affecting the teacher group. As to this, the two main propositions are that the act of 1933 is unconstitutional as impairing the obligation of contracts; and secondly, that the scheme of salary reductions violates the proviso in that act forbidding "discrimination among or between individuals in the same class of service."

The argument for unconstitutionality proceeds on these lines: after three years of contract service the teachers are entitled generally to indefinite tenure under the act of 1909, chapter 243 (Pamph. L., p. 398; 4 Cum. Supp. Comp. Stat., p. 4763, Sec. 106a); that tenure is contractual; and the legislature is powerless to interfere with it, or to authorize a board of education to interfere. All the prosecutors in the teacher group are in the indefinite tenure class.

The act of 1909, relating to tenure, provides, among other things, that no teacher shall be dismissed or subjected to reduction of salary except for certain causes after charges and a trial. That established a legislative status for teachers, but we fail to see that it established a contractual one that the legislature may not modify. If the argument now made is sound, the act of 1909 is irrepealable as to any teacher holding his position by tenure at any time thereafter. A board of education is a public body, created by the legislature, with certain powers conferred by statute. It is a municipal corporation, or at least a quasi-municipal corporation, and, as such, subject to supervision and control by the legislature. The act of 1933 is in

purport and effect, though not so entitled, an implied partial repealer or amendment of the Tenure act of 1909, and we are clear that it was well within the power of the legislature. The status of tenure teachers, while in one sense perhaps contractual, is in essence dependent on a status, like that of the incumbent of a statutory office, which the legislature at will may abolish, or whose emoluments it may change. See *Vroom* v. *Board of Education*, 79 N. J. L. 46. We are clear that the legislature could repeal the act of 1909. If it could repeal it, it can modify it as thought best, and that it did by the act of 1933. It is suggested in the brief that the teachers have rights of the same standing as those of bondholders but we see no merit in this suggestion and hardly think it is made seriously.

Secondly, with regard to the claim that there is in the resolution discrimination between individuals in the same class of service because of the varying percentages of reduction based on salary limits. We are unable to perceive any such discrimination. The resolution relating to teachers divides them into six classes according to salary, the first class including those drawing salaries from $1,200 to $1,999 per annum, and so upward by steps of $500 each except the last, where the limits are from $4,000 to $5,600. The higher the salary, the greater the percentage of reduction. But every one in the same class suffers the same per cent. reduction. It is true that in some cases where one salary is just over the minimum of the class, and another just under the maximum of the next class below, the first is cut to below the second; but that does not create a discrimination between individuals in the same class of service; it is simply an arithmetical result of applying a general formula. Counsel point out what is probably a clerical error touching two individuals who are apparently not parties to this proceeding. The complaint here is that the board did not follow its own resolution; but that vagary is not the object of attack by these writs. Again, it is said that the board paid no attention to individual merit or demerit. Naturally, it did not, as that is expressly forbidden by the statute of 1933.

As to the resolution bearing on the clerks, counsel for respondent argues that they are not entitled to protection under the Tenure act, and claims they are not protected by the proviso in the act of 1933. But be this as it may, we concur in the view of the commissioner of education that the reductions are likewise by classes according to salary, the two $1,600 clerks being reduced from $2,300; the four $1,200 clerks from $1,500; the one $1,000 clerk from $1,100; the two $900 clerks being new employes. As to the two so-called teacher-clerks, we think that one holding a teacher's certificate but doing only clerical work is properly classified as a clerk. The question is what such a person is doing, not what he or she is certified as qualified to do.

Much of the voluminous brief for the prosecutors is devoted to the proposition that "there is not justification for the assumption that there was in West New York at the time of the adoption of the salary resolutions, such a financial debacle as justified the passage of the resolutions." The brief treats this matter as though the board, without so alleging in its resolutions, assumed the existence of an emergency in West New York, and as though this court must, if it can, assume such existence in order to support the resolutions. But the preamble of the statute, fully quoted above, expressly recites that "due to present economic conditions an emergency exists which requires that boards of education be enabled to fix and determine," etc. The argument apparently ignores this fact, viz., that the legislature itself in its preamble not only assumed, but declared, the existence of an emergency "which requires that the board of education of *every* school district in this state be enabled," etc. Language could not be broader or more definite, as a preface to the enacting clause.

The judgments and decisions of the state board under review will be affirmed, with costs.